No. 89-1506

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

CATHERINE C. COOK
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner may not recover damages, on a state law claim of breach of an implied duty of good faith and fair dealing, at the rate for natural gas not purchased by respondent that the Federal Energy Regulatory Commission had previously rejected.

2. Whether the court of appeals correctly held that petitioner failed to show that respondent had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Petitioner Colorado Interstate Gas Company (CIG) and respondent Natural Gas Pipe Line Company of America (Natural) are natural gas pipelines regulated by the Federal Energy Regulatory Commission under the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.* CIG and Natural compete to purchase and transport gas out of the Overthrust region in southwest Wyoming. Since 1982, the Trailblazer System—"a series of three separately owned and operated pipelines joined end-to-end" (Pet. App. 17a n.14)—has competed with CIG's transportation system. *Id.* at 17a, 31a.[1]

[1] The court of appeals described the Trailblazer System, which runs from Wyoming to Nebraska, as follows:

In July 1982, CIG and Natural executed a seven-year contract that required CIG to deliver and Natural to purchase volumes of natural gas at two different rates: a higher "H-1" rate for gas delivered to Natural from CIG's pipeline system and the lower "F-1" rate for gas delivered from the field. Pet. App. 3a. The contract, like others entered into by pipelines during this period, contained "take-or-pay" clauses that obligated Natural to buy a certain amount of gas at specified prices and to pay for the gas even if it is not taken. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 412 (1986). The "minimum take" provision, Section 2, required Natural to buy and take delivery of specified volumes of F-1 and H-1 gas on a daily basis. The "minimum bill" provision, Section 4, required Natural to pay CIG for at least 90% of the specified total annual volume of gas, regardless of the volume actually taken. Pet. App. 5a-6a. "According to the minimum bill, all deficiency charges, whether arising under the F-1 or the H-1 rate schedules, are assessed at the lower F-1 rate." *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d 803, 805 (10th Cir. 1986), cert. denied, 479 U.S. 1043 (1987).

As required by the NGA, 15 U.S.C. 717c(c), CIG sought FERC's approval of the contract's rates and terms. Natural intervened in the FERC proceeding to challenge, among other things, its take-or-pay obligations under the contract. In May 1984, the Commission determined that the contract's "minimum bill is not just and reasonable," because "[t]he commodity charge [enables CIG to] recover[] both fixed and variable costs." *Colorado Interstate Gas Co.*, 27 F.E.R.C. ¶ 61,315, at 61,583 (1984); see *Colorado Interstate Gas Co.*, 25

The westernmost segment of the Trailblazer System, Overthrust, is owned by CIG and Natural, as well as four other companies. The middle segment, WIC [Wyoming Interstate Company Pipeline], is owned by CIG alone. The easternmost and longest segment of the system, Trailblazer, is owned jointly by [Natural] and two other companies.

Pet. App. 17a n.14; see also *id.* at 31a; Pet. 4, 6; Br. in Opp. 6.

F.E.R.C. ¶ 63,012 (1983).[2] Accordingly, the Commission ordered CIG "to amend the minimum bill provision of its tariff to Natural to eliminate all variable costs from the minimum bill." 27 F.E.R.C. ¶ 61,315, at 61,583.[3]

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[2] As the court of appeals explained, "[f]ixed costs are [the] costs which CIG must incur regardless of the volume of gas it sells. * * * The major * * * variable * * * cost * * * was the cost of gas." Pet. App. 6a n.5.

[3] The Commission made this modification retroactive to the date on which CIG's new tariff took effect—September 1982. *Colorado Interstate Gas Co.*, 27 F.E.R.C. ¶ 61,315, at 61,583-61,584 (1984); *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d at 805-806.

During this period, the Commission also addressed the propriety of "minimum bill" provisions on an industry-wide basis, having recognized that such "practices frustrated the move toward a competitive wellhead market initiated by Congress in the NGPA, since purchasers could not obtain access to cheaper sources of supply than those provided by the pipelines, for example, by purchasing directly from the producer." Order No. 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,867, at 31,510 (1989).

In Order No. 380, the Commission therefore required pipelines to eliminate their variable costs from all minimum bills. *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,571 (1984); see also Order No. 380-A, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,584 (1984); Order No. 380-C, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,607 (1984); Order No. 380-D, 29 F.E.R.C. ¶ 61,332 (1984). As the Commission explained,

> [t]he presence of variable costs in a minimum commodity bill does two things about which the Commission is concerned. First, * * * the minimum commodity bill operates to recover variable costs that are not actually incurred by the pipeline. Second, a minimum commodity bill can serve as a barrier to competition. A customer is not likely to purchase gas from an alternate supplier if it is required to pay for gas it does not take from the original supplier.

Order No. 380, FERC Stats. & Regs., at 30,959.

The Commission acknowledged that the new rule would "have the effect of allowing certain natural gas distribution companies to pick and choose among their pipeline suppliers without incurring charges for gas they do not take." Order No. 380, FERC Stats. & Regs., at 30,958. Indeed, the Commission noted that its rule might

CIG thereafter filed with the Commission a modified tariff "by which it sought to collect F-1 fixed costs for F-1 gas which Natural did not purchase and H-1 fixed costs for unpurchased H-1 gas." Pet. App. 7a. The Commission rejected that tariff and held that, in light of earlier proceedings and the Order No. 380 series, CIG could collect only F-1 fixed costs for any F-1 or H-1 gas Natural did not purchase. *Colorado Interstate Gas Co.*, 29 F.E.R.C. ¶ 61,124, at 61,244 (1984); *Colorado Interstate Gas Co.*, 30 F.E.R.C. ¶ 61,073, at 61,120 (1985). On CIG's petition for review under Section 19(b) of the NGA, 15 U.S.C. 717r(b), the court of appeals upheld the Commission's ruling. *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d at 810-811.

2. While the rate proceeding was pending before the Commission, Natural, beginning in July 1983, stopped purchasing and taking delivery of H-1 gas from CIG. Under the contract, however, CIG remained obligated "to be ready to deliver any volumes [of gas] requested by [Natural]." Pet. App. 31a. CIG therefore "could not use the pipeline capacity reserved for [Natural] to ship natural gas to other customers." *Ibid.* CIG later "offered Natural the opportunity to reduce the capacity it reserved on the CIG system. Instead of reducing its reservation, Natural chose to increase it. Thus, Natural continued to tie up CIG's capacity, while refusing to purchase gas." *Id.* at 18a-19a. As the district court, in light of the jury's verdict, summarized the record:

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prompt pipelines to "pursue [purchasing] practice[s] which unjustly or unreasonably favor[] affiliated companies, or [are] otherwise imprudent." Order No. 380-C, FERC Stats. & Regs., at 31,186. The Commission made clear, however, that it would police and regulate such practices:

> A jurisdictional pipeline will not be able to circumvent the purpose of the Natural Gas Act if it is free to chose [*sic*] an alternate source of gas supply, because its purchasing practices are * * * reviewed semi-annually in a purchased gas adjustment * * * proceeding.

Id. at 31,186-31,187; see Order No. 380-D, 29 F.E.R.C. ¶ 61,332, at 61,690.

> CIG was consequently unable to purchase gas from its own suppliers, so it shut-in gas owned by Champlin Petroleum in the Whitney Canyon area of Wyoming. Champlin and CIG began renegotiating their contract. Champlin insisted that CIG release its rights to purchase Whitney Canyon gas. CIG acceded. The next day, [Natural] bought Champlin's Whitney Canyon gas, although [Natural] still refused deliveries from CIG. [Natural] shipped the Whitney Canyon gas through the Trailblazer Pipeline [*i.e.*, the easternmost segment of the Trailblazer System, see note 1, *supra*]. In addition to acquiring Champlin's Whitney Canyon reserves, [Natural] purchased gas from new suppliers and increased its takes from existing gas suppliers.

Id. at 31a; see *id.* at 4a.

Moreover, the record showed that

> CIG attempted to offer interruptible service to new customers to utilize the capacity left vacant by Natural's decreased purchases. Soon after CIG began to service new customers, Natural resumed purchases of gas, forcing CIG to interrupt its service to the new customers. Because the Trailblazer System could offer inexpensive, uninterrupted service, CIG's new customers switched to the Trailblazer System.

Pet. App. 19a. During the period of Natural's reduced purchases from CIG, CIG's share of the market for long-distance transportation of Wyoming gas fell from 23% to 13%. The Trailblazer System's market share, however, rose from 41% to 54%. *Id.* at 21a, 23a, 52a; see Pet. 3, 11; Pet. C.A. Br. 15.

3. CIG filed this federal court action against Natural in April 1984. As tried to the jury in the fall of 1986,[4]

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[4] In the meantime, CIG availed itself of the procedures the Commission outlined in Order No. 380-C. See note 3, *supra*. In the context of Natural's purchased-gas adjustment proceeding before the Commission, CIG therefore challenged Natural's purchasing practices—the practices that gave rise to the pending federal court action. See *Natural Gas Pipeline Co.*, 34 F.E.R.C. ¶ 61,280, at 61,495 (1986). The Commission looked into the matter and, adopting the staff report's recommendation, decided to take no corrective action

CIG claimed under state law that Natural breached its contract by not taking minimum quantities of gas under Section 2 and that, in so doing, Natural also breached its "obligations of good faith performance and due diligence." Second Amended Compl. ¶ 37; see *id.* ¶¶ 18, 19, 36-38; Tr. 8760-8761. In addition, CIG claimed that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas for the benefit of the Trailblazer System, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Second Amended Compl. ¶¶ 28-32; see Tr. 8762; see generally Pet. App. 2a, 4a-5a, 9a-10a, 16a-17a, 31a.[5]

The jury returned verdicts in CIG's favor on each of those claims. The jury awarded CIG approximately $160 million in damages "on its breach of contract claim." Pet. App. 32a. Those damages represented the lost profits it would have earned had Natural purchased quantities of H-1 gas under Section 2 of the contract, calculated at the H-1 fixed-cost rate. *Id.* at 11a, 65a, 75a-78a. The jury also awarded CIG $175 million damages on its antitrust claim. *Id.* at 32a.[6]

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on "Natural's purchasing practices, * * * [including] the affiliate purchases issues raised by CIG." *Natural Gas Pipeline Co.*, 35 F.E.R.C. ¶ 61,366, at 61,835 (1986).

[5] CIG also claimed under state law that Natural had tortiously interfered with CIG's contract with Champlin Petroleum. CIG prevailed on that claim. Natural, on the other hand, unsuccessfully asserted federal antitrust counterclaims against CIG. See Pet. App. 14a-16a, 28a, 31a-33a, 58a-63a, 79a-80a. None of those claims is at issue before the Court.

[6] Although the jury's verdict reflected findings that Natural breached the contract and violated its duty of good faith and fair dealing, the jury entered one award for "actual damages" on CIG's breach-of-contract cause of action. See Resp. C.A. Br. Attachment 25 (verdict form), at 2. That award stemmed from the fact that CIG's complaint, which treated its breach of contract claim as one cause of action, see Second Amended Compl. ¶¶ 36-38, did not seek separate relief for Natural's refusal to take gas under Section 2 of the contract as opposed to Natural's failure to perform in good faith, see *id.* ¶ 46 (claiming "actual damages" for Natural's "willful and intentional breach of the [contract]"). And the district court's

In May 1987, the district court denied Natural's motion for judgment notwithstanding the verdict. Pet. App. 29a-86a.[7] The court determined that Natural had breached Section 2 of the contract and that the pertinent FERC orders "do not bar recovery of damages which are calculated from H-1 fixed costs." *Id.* at 65a. The court also concluded that the evidence supported the jury's verdict that Natural had breached its contractual duty of good faith and fair dealing. *Id.* at 69a-73a.[8] Turning to CIG's antitrust claim, the court held that the jury could have "conclude[d] that [Natural's] conduct was anticompetitive and that [Natural] specifically intended to monopoilze the long-distance transportation market for Wyoming natural gas." *Id.* at 58a.

4. In September 1989, the court of appeals reversed the contract and antitrust judgments against Natural. Pet. App. 1a-28a. The court first reviewed the pertinent

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instructions to the jury regarding CIG's "damages under its breach of contract claim," Tr. 8797-8798, which reflected CIG's theory of the case, see Pet. C.A. Br. 90 n.97 ("CIG claimed the same damages for each contract breach."), likewise made no such distinction:

> If you find that Natural breached the [contract] between [CIG] and Natural, then you may award [CIG] its actual damages caused by the breach. The actual damages you award should put [CIG] in as good a position as it would have been if Natural had performed under the [contract]. A proper measure of damages is the profit that [CIG] would have made if Natural had fully performed, together with any incidental damages, but less any expenses saved because of the breach.

Tr. 8798; see also Pet. App. 12a n.10.

[7] On review, the district court also eliminated certain duplicative and improper damages. After trebling the modified antitrust award, the court entered a total judgment of more than $400 million—approximately $60 million in contract damages, $340 million in antitrust damages, and $8 million in tort damages. Pet. App. 2a, 33a, 75a-82a; see Resp. C.A. Br. Attachment 2, at 1-2.

[8] The court pointed to evidence that Natural "renominated its full capacity under the [contract], yet refused to accept delivery of those volumes [from CIG] when the renomination became effective," and that Natural "singled out CIG for minimal or zero takes and failed to follow its own gas scheduling policies." Pet. App. 72a.

FERC rate proceedings and found that the "only formula for the elimination of variable costs approved in the individualized proceedings required CIG to charge F-1 fixed costs for [Natural's] failure to purchase either F-1 or H-1 gas." *Id.* at 9a. The court thus reached the "inescapable conclusion * * * that FERC regarded this as the sole remedy for failure to purchase gas under [the contract]." *Ibid.*[9] Accordingly, the court held that federal law preempted CIG's breach of contract claim for an H-1 fixed cost rate for gas not taken.

Based on the FERC rate proceedings, the court next determined that "Natural is [also] free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the [contract]." Pet. App. 10a. The court explained that "[t]hrough [that] claim * * *, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas," although "FERC and [the court of appeals] have repeatedly denied CIG's request to modify the minimum purchase obligation of the [contract] to allow it to collect this rate for failure to purchase gas." *Id.* at 11a. The court of appeals thus concluded that "[b]y allowing CIG to press [its] claim, the district court gave CIG a second chance to which it was not entitled." *Ibid.*[10]

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[9] In the court of appeals, FERC filed a brief amicus curiae, taking the position

> that while Natural failed to buy gas from CIG at a time its contract required a minimum purchase of 90% of the contract volume, the Commission has already fixed the remedy which the district court was required to follow. Under the remedy established by the Commission, CIG may collect 100% of F-1 fixed costs for past periods * * *.

FERC Br. 11. The Commission took no position "on the propriety *vel non* of the conduct in which the jury found Natural engaged, nor whether Natural violated the antitrust laws. Moreover, the Commission [did] not discuss whether the court could have fixed proper antitrust damages, such as lost profits." *Ibid.*

[10] The court rejected CIG's contention that there was an "impl[ied] * * * good faith limitation upon the scope of FERC's remedy for failure to purchase gas." Pet. App. 11a. The court stated that "limiting the scope of the FERC developed remedy for failure

Turning to CIG's antitrust claim, the court recognized that that "claim is unusual because it does not allege that Natural was attempting to gain control of the transportation market for itself. Rather, CIG alleges Natural stopped purchasing gas in order to give CIG's chief competitor, the Trailblazer System, a monopoly in the long distance gas transportation market." Pet. App. 17a.[11] Assuming "that it is possible to create a monopoly for the benefit of a third party [in violation of Section 2 of the Sherman Act]," *id.* at 18a, the court concluded that CIG "did not establish [a requisite] element[] of an attempted monopolization claim," *ibid.*, namely, "a dangerous probability of successful monopolization," *id.* at 20a.[12]

The court rejected CIG's contention that "the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly." Pet. App. 21a. The court noted that such evidence would be sufficient "[i]f this were a typical attempted monopolization case in which the defendant was attempting to acquire a monopoly for itself through the use of economic coercion." *Ibid.*[13]

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to purchase gas in the manner suggested by CIG would permit circumvention of FERC authority through state contract law. In order for FERC's remedy to be effective, it must have room to breathe." *Id.* at 12a (citing *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 582 (1981)). And the court observed that, in light of the Commission's proceedings here and those in the curtailment context, see, *e.g.*, *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987), "[a]ctions based upon tort were not meant to be preempted by FERC's modification of the contract, while actions based upon breach of contract were." Pet. App. 14a.

[11] The court further noted that the Trailblazer System was "owned in significant part by [CIG,] the alleged victim of the monopolistic scheme." Pet. App. 18a.

[12] The court therefore had no occasion to address the "thorny issue" whether a defendant could be held liable for attempting to confer monopoly power on another entity. Pet. App. 18a.

[13] In a typical case, the court noted,

> a market share at the commencement of the defendant's predatory conduct of 41% would show that the defendant would

The court concluded, however, that this was not such a typical case. First, Natural's alleged "conduct says little about its *intended beneficiary's* (the Trailblazer System's) proclivity or ability to monopolize." *Id.* at 18a n.15. Second, the Trailblazer System's market share "does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." *Id.* at 22a. Third, Natural "did not use economic coercion in its attempt to monopolize," but rather "took advantage of its contractual right to stop purchasing gas from CIG to magnify the Trailblazer System's position in the market." *Ibid.*

Here, "Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers." Pet. App. 23a. "By exercising *all* its rights under the [contract] to tie up the *entire* capacity it had reserved," the court determined, "Natural was still only able to raise the Trailblazer System's market share to 54%." Accordingly, the court concluded that "[t]here was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist." *Id.* at 23a-24a.

The court found further support for its holding by reasoning that "[i]f the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense." Pet. App.

> not have to acquire much additional market share in order to attain monopoly control over the market * * * [and] typically indicates that a firm has substantial economic power in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels.

Pet. App. 21a-22a. The court had no occasion to decide the "minimum market share necessary to indicate a defendant has monopoly power," although it observed that other "lower courts generally require a minimum market share of between 70% and 80%." *Id.* at 21a n.18.

25a.[14] Since the "Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity," roughly six years from the initial tie-up, and since CIG would not be driven out of the transportation business before that right expired, the court determined that Natural's conduct did not "threaten[] to create substantial and persistent changes in the marketplace." *Id.* at 27a. In sum, the court concluded that "there was no dangerous probability that Natural would bestow upon the Trailblazer System the degree of market power either in terms of market share or persistence, necessary for the monopolization offense." *Id.* at 28a.

DISCUSSION

Despite the broadside attack on the court of appeals' decision leveled by CIG and its amici, see, *e.g.*, Pet. 12; Amici Br. 8, the judgment below raises two relatively narrow and distinct issues, namely, whether pertinent FERC orders barred CIG's state law contract claim based on Natural's failure to take H-1 gas, and whether CIG established that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas. In our view, the court of appeals—based on the particular record in this case—correctly resolved both issues. And since the decision below does not present any square conflict with another court of appeals decision, arises in an unusual factual context not likely to be replicated, and is thus an unsuitable vehicle for addressing generally applicable issues of federal preemption or attempted monopolization under the Sherman Act, further review is not warranted.

1. a. Under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), the Commission exercises exclusive author-

[14] The court qualified its analysis, stating that "[o]nly when an alleged monopolist faces substantial competition from a *known competitor* who will enter the market in a *definite period of time*, ought courts to decline to find sufficient market power to satisfy the requirement for the monopolization offense." Pet. App. 26a n.23.

ity to determine the reasonableness of filed rates, and no seller of interstate gas may lawfully collect a rate higher than that filed and approved by the Commission. See, *e.g.*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 963-965 (1986); *Arkansas Louisiana Gas Co.* v. *Hall* (*Arkla*), 453 U.S. 571, 576-577 (1981). As this Court has recognized, the Commission exercises "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988), which necessarily includes the power to fix and enforce rates for those transactions. And under the filed rate doctrine,[15] "the right to a reasonable rate is the right to the rate which the Commission * * * fixes, and * * * except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable one." *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951).

As a consequence of that statutory scheme implicating the filed rate doctrine, this Court has made plain that courts, in the context of resolving actions filed under state law, lack authority to award damages that represent a change in the rate for natural gas approved by the Commission and provided by Congress in the NGA and NGPA. *E.g.*, *Arkla*, 453 U.S. at 578-579; *Montana-Dakota*, 341 U.S. at 251-252. As this Court stated,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." * * * Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It

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[15] The "filed rate doctrine," as this Court has stated, generally "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the [Commission] pursuant to the Natural Gas Act." *Arkla*, 453 U.S. at 573.

> would surely be inconsistent with this congressional purpose to permit a * * * court to do through a breach-of-contract action what the Commission itself may not do.

Arkla, 453 U.S. at 580; cf. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

b. In light of the foregoing principles, the court of appeals here correctly concluded that pertinent FERC orders barred CIG's state law contract claim based on Natural's failure to take H-1 gas. In the context of reviewing CIG's tariff filings, the Commission considered and determined Natural's liability for failure to perform its contract with CIG, *i.e.*, Natural's refusal to purchase quantities of H-1 gas. As the Commission made plain, "CIG was prohibited from requiring Natural to purchase gas under either the minimum bill or minimum take provisions of its [contract], or from collecting variable costs for gas not purchased under those provisions." *Colorado Interstate Gas Co.*, 31 F.E.R.C. ¶ 61,325, at 61,742-61,743 (1985). In other words, the Commission concluded that CIG could collect only F-1 fixed costs for any F-1 or H-1 gas Natural did not purchase. *Colorado Interstate Gas Co.*, 29 F.E.R.C. ¶ 61,124, at 61,244 (1984); *Colorado Interstate Gas Co.*, 30 F.E.R.C. ¶ 61,073, at 61,120 (1985).

The record shows, however, that CIG based its state law claim of breach of an implied duty of good faith and fair dealing principally on Natural's failure to purchase quantities of H-1 gas and thus sought (and recovered) H-1 fixed costs. See pp. 6-7, *supra*.[16] Such a state law claim,

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[16] Indeed, a comparison of the jury instructions on CIG's interrelated contract claims confirms this point. With respect to CIG's breach of contract claim, the instructions identified the following principal elements: that "Natural failed to request on a daily basis the minimum specified volume [of gas] under Section 2 of the [contract]" and that "Natural failed to pay the proper fixed costs associated with the volumes not taken under Section 2." Tr. 8767. With respect to CIG's claim of breach of good faith and fair dealing, the instructions identified the following principal elements: that Natural "must do nothing destructive of [CIG's] right to enjoy the benefits of the contract," that "[g]ood faith performance of the contract emphasizes faithfulness to the purpose [CIG and

in the context of the extensive FERC proceedings, seeks to reopen precisely what the Commission had already resolved—the measure of CIG's recovery for Natural's failure to purchase H-1 gas as required by the contract. As the court of appeals therefore correctly concluded, "[b]y allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled." Pet. App. 11a.

c. CIG seeks to avoid this straightforward application of federal law, and deprive the Commission's proceedings of significance, by asserting that the Commission had no occasion to consider the consequences of Natural's bad faith conduct in refusing to purchase H-1 gas under the contract. See Pet. 16-18; Reply Br. 1-4. That asserted distinction is unpersuasive. First, FERC, in the context of the protracted rate proceedings in which CIG unsuccessfully sought approval to recover H-1 fixed costs for gas not taken, drew no such distinction. To the contrary, the Commission limited CIG's recovery to F-1 fixed costs. See pp. 2-4, *supra*.[17] Second, to the extent

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Natural] agreed upon in the contract and consistency with the justified expectations of [CIG]," and that Natural "was * * * required not only to act honestly, but also to observe reasonable commercial standards of fair dealing in the natural gas industry." Tr. 8770-8771. Thus, the linchpin of CIG's contract claims was Natural's failure to purchase H-1 gas.

[17] For that reason, CIG mistakenly claims (Pet. 13 & n.7, 17 & n.15; Reply Br. 3) that the court of appeals' decision conflicts with the Commission's "curtailment cases" such as *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987). There, the Commission's orders under review permitted pipelines to pursue and recover damages on certain fault-based claims. *Id.* at 426-428.

CIG and its amici also err in contending (Pet. 13-15; Reply Br. 2-3; Amici Br. 9-10) that the court of appeals' decision conflicts with *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). There, the court of appeals, in upholding the Commission's determination, held that the plaintiff could pursue its contractual claim against the defendant for refusing to negotiate in good faith but that "[t]he district court may not compensate [plaintiff] on the theory that it would have paid rates different than the filed rates if [defendant] had not breached." *Id.* at

CIG raised before the Commission the issue of Natural's bad faith purchasing practices, the Commission expressly declined to alter its ruling that limited CIG's recovery to F-1 fixed costs. See note 4, *supra*; see also note 9, *supra*.

d. In these circumstances (involving FERC orders prescribing the measure of recovery for nonperformance of the purchase obligation at issue), the court of appeals had no need to consider the preemptive effect of the Commission's industry-wide Order No. 380 (note 3, *supra*) in holding that federal law barred CIG's contractual claim. Accordingly, this case is not the vehicle CIG and its amici describe (Pet. 15-19; Reply Br. 3-5; Amici Br. 11-13) for addressing the extent to which the Commission's general orders affecting outstanding contracts subject to its rate jurisdiction impliedly preempt state law causes of action based on failure to perform those contracts.[18]

Moreover, two other considerations make further review of CIG's broader preemption issue inappropriate. First, to the extent CIG complains of the Commission's failure to address a pipeline's bad faith conduct in its general orders, CIG is mistaken. See Order No. 380-C, FERC Stats. & Regs., at 31,186-31,187; Order No. 380-D, 29 F.E.R.C. ¶ 61,332, at 61,690; note 3, *supra*. Second, there is only one pending proceeding before the Commission involving the preemptive effect of Order No. 380 on state law causes of action, and petitioner cites no other cases raising that issue in the lower courts.

1471. Here, by contrast, CIG's contractual claim sought recovery based on the rate for natural gas not purchased by Natural that the Commission had previously rejected. See pp. 6-7, *supra*; see also Br. in Opp. 19-20.

[18] There is considerable force to petitioner's criticism (Pet. 18-19) of the court of appeals' reliance—in the preemption context—on the need for "room to breathe." Pet. App. 12a; see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Nonetheless, since the court's statement was unnecessary to its judgment, further review of that aspect of the opinion below is not warranted.

2. a. In order to prevail on its antitrust claim that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, CIG needed to show, among other elements, that there was a "dangerous probability of success in monopolizing [that] market." *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 161 (10th Cir. 1986). In reviewing that claim, the court of appeals recognized the peculiar context of CIG's complaint, namely, that "Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers" and that Natural had "exercis[ed] *all* its rights under the [contract] to tie up the *entire* capacity it had reserved." Pet. App. 23a. This context altered the usual analysis. In these circumstances, the court treated CIG's claim as amounting to one of actual monopolization because the full potential market impact of Natural's conduct had been achieved—a characterization neither CIG nor Natural disputes before this Court, see, *e.g.*, Pet. 26, 27; Br. in Opp. 20-22. The question of probability of success had resolved itself into the question whether success had been achieved. Accordingly, in focusing on whether "the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly," Pet. App. 21a, the court of appeals addressed whether this monopoly had actually been attained.

In finding such market share evidence alone insufficient to establish CIG's antitrust claim, the court of appeals necessarily determined that CIG had failed to prove that the Trailblazer System had the power to exclude competition and control prices, *i.e.*, monopoly power. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). And nothing about the actual impact on competition or prices can be inferred from the jury's verdict, because the jury had been instructed that it could find liability even if monopoly power had not been achieved. See Tr. 8777-8784. CIG contends (Pet. 16;

Reply Br. 7), however, that the court of appeals found that Natural's conduct resulted in supracompetitive pricing: "In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity." Pet. App. 27a. But that statement, which does not refer to any evidence of supracompetitive pricing,[19] cannot bear the weight CIG would have it carry. When read in context, namely, after the court had already concluded that there was no reasonable chance that Natural could confer monopoly power on the Trailblazer System, see Pet. App. 23a-24a, the statement suggests only that the duration of any ability to charge supracompetitive prices would be limited.

With respect to any exclusion of competition, the court of appeals noted that, as a result of Natural's exercise of its contract rights, CIG could not offer on a firm basis "a certain amount of space in CIG's pipeline" to others. Pet. App. 23a.[20] Nonetheless, the court pointed to the absence of record evidence to show "how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and how much the market share gain simply resulted from the Trailblazer System's constant sales level in comparison with CIG's sales losses." *Id.* at 22a-23a n.19. Moreover, the court noted that CIG enjoyed "record profitability during Natural's tie-up." *Id.* at 27a n.25. The court of appeals therefore appears to have

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[19] Indeed, the court also noted that the Trailblazer System could offer "inexpensive, uninterrupted service." Pet. App. 19a.

In passing, CIG refers (Reply Br. 8 n.3) to the district court's statement in its post-trial opinion that "CIG's exclusion resulted in higher prices to producers, shippers and consumers of natural gas." Pet. App. 40a-41a. The district court, however, was not the trier of fact. There are, moreover, remedies available before FERC for imprudent or unreasonable charges. See notes 3 and 4, *supra*.

[20] The court had also noted, however, that CIG could and did offer that capacity on an interruptible basis. Pet. App. 19a. CIG, moreover, did not request FERC to relieve it from this aspect of the contract obligation, in light of Natural's nonperformance of the purchase obligation.

found that the record did not show that Natural's conduct excluded competitors from the market.

b. As we read the court of appeals' decision, the court held that in the absence of evidence of direct proof of monopoly power, the market share evidence presented by CIG was insufficient to support its antitrust claim. For that reason, unlike CIG and its amici (see, *e.g.*, Pet. 12, 19-23, Reply Br. 6-7; Amici Br. 13-15) we do not read the court of appeals' opinion as adopting what would be a plainly incorrect proposition of law—that a firm cannot monopolize unless it has a market share greater than 54%. See *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948) ("relative effect of percentage command of a market varies with the setting in which that factor is placed"); *Hayden Publishing Corp.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 131 & n.15 (2d Cir.), cert. denied, 454 U.S. 968 (1981); *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Indeed, in a recent decision, the Tenth Circuit emphasized that

> [w]e do not view *Colorado Interstate Gas* as establishing a firm market share percentage required before a finding of monopoly power can ever be sustained. We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate monopoly power.

Reazin v. *Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 967-968 (10th Cir.), cert. denied, 110 S. Ct. 3241 (1990); accord *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d at 162 (cited by court of appeals for proposition that "[t]he likelihood of successful monopolization is *typically* evaluated by examining the defendant's share of the relevant market," Pet. App. 21a (emphasis added)).

c. To be sure, we share the concerns raised by CIG and its amici (see, *e.g.*, Pet. 20-21, 23-24; Amici Br. 15-16) about that aspect of the court of appeals' opinion relying on the six-year term of the contract as evidence that any

monopoly power would be transitory. See Pet. App. 24a-28a. A transitory ability to extract high prices from consumers is of less antitrust concern than an enduring ability to charge such prices. Nonetheless, there is no sound basis for the court of appeals' apparent conclusion that Section 2 of the Sherman Act may not apply to substantial market power acquired through predatory means, if the duration of that power is fixed in advance and the parties whose entry will eventually dissipate it are identified.[21] In our view, six years of lost consumer welfare resulting from predatory conduct certainly implicates Section 2.

The court of appeals' misstatement about the scope of Section 2, however, does not call for this Court's review. That aspect of the court of appeals' opinion was not necessary to its judgment, since it had already held on other grounds (as noted above) that there was "no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist." Pet. App. 23a-24a. Indeed, the court prefaced its discussion by stating that "if we look beyond market share statistics, we are further convinced [that CIG's antitrust claim fails]." *Id.* at 24a. Further review of the court of appeals' alternative basis for rejecting CIG's antitrust claim, accordingly, is unnecessary.

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[21] Neither of the cases the court of appeals cited supports its narrow reading of Section 2. In *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987), the plaintiff claimed that the defendant exercised monopoly power for one year because the defendant's competitor could not deliver the product during that period. The D.C. Circuit rejected the "proposition that a seller who can deliver a product sooner than a *known* competitor is a monopolist under the antitrust laws for the period in which he alone is able to deliver." *Id.* at 251-252. And in *Metro Mobile CTS, Inc.* v. *Newvector Communications, Inc.*, 661 F. Supp. 1504 (D. Ariz. 1987), as a result of the regulatory delay in its entry into the relevant market, the plaintiff contended that the defendant had monopoly power during that "headstart" period. The court recognized that "it may be possible to have 'temporary monopoly power' in another context," but held that the plaintiff had shown no such power on the record presented. *Id.* at 1523.

d. Finally, as CIG suggests (Pet. 20), there is confusion among the lower courts regarding the standards for attempted monopolization under Section 2 and courts continue to have difficulties in distinguishing between business torts and actionable conduct that threatens competition. This case, however, is not a suitable vehicle for addressing those issues under Section 2. First, in light of the peculiar record, the court of appeals treated CIG's antitrust claim as alleging actual monopolization—a characterization neither CIG nor Natural disputes here. Second, CIG's claim arises in a particular regulatory context in which relevant legal principles may not apply in the same manner that they would to firms in other market contexts. Third, this case has an unusual (if not unique) factual context, *i.e.*, where the alleged predatory conduct is the manipulation of rights created by contract between the plaintiff and the defendant and where the plaintiff has a share in the entity on which the defendant is alleged to have conferred monopoly power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

CATHERINE C. COOK
Attorney
Federal Energy Regulatory Commission

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